U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 01 2014

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The employment based immigrant visa petition was initially approved by the by the Director, California Service Center. On further review of the record, the director determined that the beneficiary was not eligible for the benefit sought. The director served the petitioner with notice of intent to revoke the approval of the preference visa petition. The director subsequently revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner sought to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a graphic design firm. It sought to employ the beneficiary permanently in the United States as a graphic designer. As required by statute, the petition was accompanied by an individual labor certification approved by the Department of Labor.

The record indicates that the Immigrant Petition for Alien Worker (I-140) was initially filed on March 22, 2001. It was initially approved on July 6, 2001. The alien beneficiary filed an application to adjust her status to that of lawful permanent resident. Following the receipt of information from both the petitioner and the beneficiary relevant to the beneficiary's application to adjust to permanent resident status, the director concluded that the I-140 was approved in error and issued a notice of intent to revoke the petition on December 7, 2002. The director concluded that the petitioner had failed to establish its continuing ability to pay the proffered wage as of the visa priority date. The petitioner's response and subsequent submission of additional evidence failed to convince the director to revise his decision and the petition's approval was revoked on March 27, 2003, pursuant to section 205 of the Act, 8 U.S.C. § 1155.

On appeal, the petitioner, through counsel, asserts that the director's analysis did not accurately reflect the petitioner's ability to pay the proffered wage.

Section 205 of the Act, states: "[t]he Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) provides in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank

account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS).

Eligibility in this case rests upon the petitioner's continuing ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). Here, the petition's priority date is January 12, 1998. The beneficiary's salary as stated on the labor certification is $22.61 per hour based on a 40-hour week, or $47,028.80 per annum. As reflected in Part 5 of the I-140, the petitioner claims that it was established in 1968, currently has thirty-five employees, and produces an annual gross income of $2,400,000.

Relevant to the petitioner's ability to pay the proposed annual wage offer of $47,028.80, a copy of the petitioner's Form 1120, U.S. Corporation Income Tax Return for 1999 was submitted with the initial filing of the petition. It shows that the petitioner files its federal tax returns using a fiscal year running from February 1st to January 31st of the following year. Thus, the petitioner's 1999 corporate tax return reflects data covering the period between February 1, 1999 and January 31, 2000. It shows that the petitioner reported taxable income of $82,844 before taking the net operating loss (NOL) deduction. Schedule L of the petitioner's 1999 tax return indicates that the petitioner had -$141,123 in net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[1] Besides net income, as an alternative method of demonstrating the ability to pay a proposed wage offer, CIS will review a petitioner's net current assets as an available resource out of which the proffered wage may be paid A corporation's year-end current assets and current liabilities are shown on Schedule L of the federal tax return. If a corporate petitioner's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. For 1999, although the petitioner's net current assets were not sufficient to pay the proffered wage of $47,028.80, the taxable income before the NOL deduction was adequate to cover the beneficiary's proposed wage offer.

As part of the financial information provided pursuant to the adjudication of the beneficiary's application for permanent residence, copies of the petitioner's federal tax returns for 2000 and 2001 were also provided. Together, they represent the petitioner's financial data from February 1, 2000 to January 31, 2001, and February 1, 2001 to January 31, 2002 . They contain the following information:

Year	2000	2001
Taxable income (before NOL deduction)	$ 70,837	-$30,107
Current Assets	$ 4,900 (state tax return)	$10,453

[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Current Liabilities	$177,033 (state tax return)	$ 4,718
Net current assets	($172,133)	$ 5,735

As shown above, although the petitioner did not include Schedule L with its 2000 federal tax return, it is noted that the petitioner's 2000 taxable income of $70,837 was sufficient to cover the proffered wage during that period. Along with the petitioner's tax returns, copies of the beneficiary's Wage and Tax Statements (W-2s), issued by the petitioner, from 1998 through 2001, were also submitted. They show that the petitioner paid the following wages to the beneficiary:

Year	Wages
1998	$30,229.20
1999	$31,362.48
2000	$33,594.16
2001	$35,408.96

In addition, counsel submitted copies of three of the beneficiary's pay stubs covering the pay periods between July 25th and October 2, 2002. They show that the petitioner paid the beneficiary $1,811.20 during each of those three pay periods, and by October 2, 2002, her payroll record showed $32,601.60 year-to-date earnings received from the petitioner during 2002.

The director observed in his notice of intent to revoke, dated December 7, 2002, that the petitioner had never paid the proffered wage to the beneficiary and had not established that it had the continuing ability to pay the beneficiary's proposed wage offer. The director advised the petitioner that it had thirty additional days to respond to the director's intent to revoke. If it responded, the director instructed the petitioner to provide evidence that it was paying the beneficiary the proffered wage from the priority date of January 12, 1998 to the present, copies of the beneficiary's last three pay stubs and a recent letter showing that the petitioner was offering a full-time permanent position.

In response to the notice of intent to revoke, counsel submitted a letter dated January 3, 2003, indicating that the petitioner would pay the beneficiary the proffered wage upon receipt of permanent residence. Counsel also indicated that copies of the beneficiary's last three pay stubs and a copy of her 2002 W-2 were enclosed. The record does not contain such documents. Counsel's letter further states that a recent letter from the petitioner and a letter from an accountant were enclosed. These letters do appear in the record. The petitioner's letter, dated December 31, 2002, states that it continues to offer the beneficiary a full-time permanent job as a graphic designer. A letter from Don G. Jung of Jung, Novikoff, Bellanca & Company, an accounting firm, dated December 26, 2002, indicates that the director's analysis of the petitioner's tax returns should have included consideration of the petitioner's gross income, depreciation expense, allocation of the officers' compensation, retained earnings of $464,626 for the year ending January 31, 2002, and assets of $574,880. The accountant's letter does not reference from where the figure of $574,880 is drawn, but it appears on the petitioner's 2000 California tax return as the amount of the petitioner's total assets and total liabilities at the beginning of the taxable year.

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The director revoked the petition on March 27, 2003, finding that the petitioner had not established its continuing ability to pay the proffered wage.

On appeal, counsel states that the petitioner has provided all tax returns necessary to establish the petitioner's ability to pay the proffered wage for all years in question. Counsel also asserts that, although the petitioner showed a loss in taxable income in 2001, it was actually paying the proffered wage to the beneficiary at the time, having been paying the beneficiary as a trainee before September 2001, when she filed for employment authorization pursuant to a pending application for permanent residence. Counsel also renews the arguments presented by the accounting firm relating to the petitioner's 2002 retained earnings of $464,626 and assets of $574,880, and asserts that the petitioner has paid salaries and wages between $300,000 and over $1,000,000 annually. Counsel resubmits copies of the petitioner's 2001 federal tax return, a copy of the beneficiary's 2001 W-2, and copies of the beneficiary's three 2002 pay stubs. Counsel also submits a brochure illustrating the petitioner's graphic design business.

As set forth in 8 C.F.R. § 204.5(g)(2), the central focus of an employment based immigrant petition for an alien worker, with regard to a petitioner's financial information, is whether a petitioner can demonstrate its ability to pay the proffered wage beginning at the priority date, not whether it has actually paid the proffered wage, although this may be a relevant factor. The obligation to pay the wage offered in the ETA -750A does not begin until the alien adjusts his or her status in the United States or enters the country using an immigrant visa issued on the basis of an approved employment based petition and approved labor certification. *See* 20 C.F.R. § 656.20(c). It is noted that this does not foreclose any separate obligation to pay at least the prevailing wage under relevant non-immigrant regulations.

Counsel's claim that all pertinent tax returns necessary to establish the petitioner's continuing ability to pay the proffered wage have been provided, is not accurate. The petitioner failed to provide copies of its 1997 and 1998 federal tax returns, which would have covered the priority date of January 12, 1998 by showing the petitioner's financial information from February 1, 1997 through January 31, 1998 and from February 1, 1998 through January 31, 1999, respectively. It is further noted that counsel's statement regarding the level of salaries and wages that the petitioner has paid does not appear to be correct. According to line 13 of its federal tax returns reflecting salaries and wages paid, the petitioner reported the amounts of $1,244,519 in 1999, $295,456 in 2000 and $297,351 in 2001.

In determining a petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, because the petitioner's taxable income in 1999 and 2000 were sufficient to cover the proffered wage of $47,028.80, and the other tax returns were not provided, the only remaining year in question is 2001. In that year, the beneficiary's W-2 indicates that the petitioner paid $35,408.96 in wages to her, which is $11,619.84 less than the proffered salary of $47,028.80. While the AAO recognizes that the petitioner's 2001 tax return reflects a difference of one month from a tax return using a standard calendar year, it is noted that neither the petitioner's reported net income of -$30,107, nor its 2001 net current assets of $5,735, could cover the $11,619.84 shortfall. It is also noted that, contrary

to counsel's assertion, the pay stubs provided do not relate to the beneficiary's wages in 2001, but, as mentioned above, reflect her wages for three pay periods in 2002.

If a petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, as mentioned above, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, asserting that the petitioner paid gross wages or officer compensation in excess of the proffered wage is insufficient. Funds already disbursed are not available to pay the proffered salary. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

As discussed above, CIS will also examine a petitioner's net current assets. The AAO rejects counsel's argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. Moreover the figure quoted by counsel as representing the petitioner's total assets as of January 1, 2002, actually appears in the petitioner's state tax return for 2000. Moreover, the petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. In this case, however, the petitioner's 2001 net current assets of $5,735 failed to cover the difference between the proffered wage and the wages actually paid to the beneficiary during that period.

Counsel's suggestion that the petitioner's unappropriated retained earnings should also be considered in support of its financial ability to pay the beneficiary's wage offer is also rejected. Counsel cites no legal authority for this proposition. It is noted that the court in *Sitar v. Ashcroft*, 2003 WL 22203717 (D. Mass) specifically rejected this line of reasoning, concluding that CIS had sufficiently considered the petitioner's assets as reflected on the Schedule L balance sheet.

The AAO cannot conclude that the director erred in revoking the approval of the petitioner's I-140 based on the petitioner's failure to show its continuing ability to pay the beneficiary's wage offer as of the priority date of January 12, 1998. A petitioner must establish its continuing ability to pay based on the requirements set forth in 8 C.F.R. § 204.5(g)(2), which states that annual reports, federal tax returns and audited financial statements are the fundamental forms of evidence to be considered. While additional evidence may be offered, it must contain sufficient independent probative value in order to be accepted as competent. In this case, the petitioner failed to offer all of the relevant tax returns as claimed, and its 2001 return showed that neither its net income,

nor its net current assets were sufficient to pay the beneficiary's proffered salary. Based on the financial data that was provided to the record, the petitioner has not demonstrated its continuing ability to pay the proffered wage as of the priority date of the petition.

In view of the foregoing, the AAO concludes that the director properly revoked the approval of the petition. Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.